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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 13

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1625, AFL-CIO, and WILLIAM TRAVIS, President of Retail Clerks International Association, Local 1625, AFL-CIO, *Petitioners,*

v.

ALBERTA SCHERMERHORN, LOIS DEVITA, JOYCE E. THURO, and LARRY STARK, *Respondents.*

On Writ of Certiorari to the Supreme Court of Florida

REPLY BRIEF FOR PETITIONERS

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v.

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REPLY BRIEF FOR PETITIONERS

INTRODUCTION

Respondents' position before the Court is supported by *amici curiae* briefs filed by the U.S. Chamber of Commerce, the Commonwealth of Virginia, and the State of Florida. Florida's *amicus* brief is joined in by twelve other "right-to-work" States.

With insignificant exceptions, these *amici curiae* make no arguments which are not also made by respondents, and, therefore, we shall fully answer them by answering re-

spondents. It should be noted, however, that the *amici* briefs contain factual inaccuracies[1] and unsupported expressions of opinion.[2]

I. Respondents Totally Ignore the Words "Membership in A Labor Organization" of § 14(b), and They Similarly Ignore Petitioners' Duty to Represent All Bargaining Unit Employees.

Our opening brief discusses at length the meaning of "membership in a labor organization," which are the critical words of § 14(b). As the Court has said, "we must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." *Richards* v. *United States*, 369 U.S. 1, 9 (1962). "Membership" has ordinary and substantive meaning in § 14(b), as it does in other sections of the Labor Act, other federal statutes, and many decisions of this Court. (Petitioners' Br., pp. 25-33.)

Respondents' brief barely mentions the language of § 14(b). Quite to the contrary, respondents' brief would lead one to think that the language of § 14(b) expressly

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[1] In its statement of facts, the Chamber of Commerce asserts (C. of C. *Amicus* Br., p. 2):

"This cause stems from the objections of four persons . . . to their employer deducting money from their wages to support Local 1625. . . ."

The contract in question does not require or permit the employer to deduct service fees from the wages of non-union employees. On the contrary, the contract expressly provides that the employer may deduct initiation fees and dues only from the wages of union members voluntarily authorizing such deductions (R. 13 [Art. 19, Sec. 1, p. 14]).

The Chamber of Commerce asserts that under an agency shop agreement an employee who is not a union member must pay "union special assessments required of union members" (C. of C. *Amicus* Br., p. 4). This assertion, to the extent that it was intended

authorizes the states to prohibit "compulsory unionism," not "membership in a labor organization."

Respondents impliedly ask this Court to ignore the language of § 14(b) and to determine its meaning solely on the basis of several selected quotations from its voluminous legislative history. The transparency of respondents' position was suggested in *Greenwood* v. *United States*, 350 U.S. 366, 374 (1956), where Justice Frankfurter quoted the wag who said, "When the legislative history is doubtful, go to the statute."

Respondents' egregious failure even to discuss the language of the statute is a tacit concession that, in order for respondents to prevail, the Court must ignore Congress's language and rely exclusively on fragments of the legislative history. As will be demonstrated hereafter, those

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to apply to the case at bar, is completely untrue. Under the contract at bar, no payments are required of non-member employees except for initial and monthly service fees for collective bargaining services (R. 3-4). The contract expressly provides that, other than service fee payments, "employees who do not choose to join the Union shall be under no further financial obligations or requirements of any kind to the Union" (R. 4), nor is it alleged in the complaint that non-member employees might under any conceivable circumstances be required to pay "special assessments."

[2] Virginia expresses this opinion in its brief (Va. *Amicus* Br., p. 4-5):

"Under the policy of 'Right-to-Work' labor unions, management and workers have prospered in this State. Labor-Management relations have been good and the 'climate' thus produced has been conducive to the establishment within the State of new industries which have provided job opportunities to a growing population and strength to the State's economy."

Although this assertion by the Commonwealth of Virginia is plainly immaterial to any issue in this case, the view of some economists and students of labor relations is that right-to-work laws tend to produce economic results the opposite of those suggested by Virginia. See, *e.g.*, Toner, Right-to-Work Laws: Public Frauds, 8 Lab. L. J. 193 (1957).

parts of the legislative history on which respondents rely are out of context and inconclusive.

The Florida Supreme Court reasoned that Article 19, Section 2, of the contract is a "subterfuge" to escape the state's power to prohibit "membership" (R. 24). Respondents do not make even this tenuous argument, apparently conceding that Article 19, Section 2, does not compel "membership" in any sense. Instead, respondents contend § 14(b) permits the States to prohibit "compulsory unionism," regardless of "membership" requirements. (Respondents' Br., p. 39.)

Respondents similarly make no real effort to respond to the argument in our opening brief that, under the *Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192 (1944), and *Syres* v. *Oil Workers*, 350 U.S. 892 (1955), line of cases, petitioners have an affirmative statutory duty to represent all bargaining unit employees equally, even though this duty may be very costly to petitioners. (Petitioners' Br., pp. 33-37.) If there is even an implicit answer to this argument in respondents' brief, it is this (Respondents' Br., p. 44):

> "More fundamental than the claim of this wealthy, tax-exempt union for a broader distribution of collective bargaining costs is the inherent right of the respondents, and all persons, to work for a living without fear or coercion. The right to work is an individual liberty of the highest order, and one that should not be subordinated to the economic claims of any organization, whether it be a labor union, lodge, church, political party or any other group."

Respondents' "right-to-work" is not remotely at issue here: the issue is whether Florida has the power under §14(b) to immunize respondents from sharing the costs of

collective bargaining services which petitioners, by law, must provide.

Not only respondents but also the *amici curiae* who support respondents have wholly ignored the plain language of § 14(b) and the statutory duty imposed on petitioners to represent respondents in collective bargaining. These arguments remain unanswered.

II. The Fragments of Legislative History in Respondents' Brief Do Not Show That Congress Intended to Confer Jurisdiction on State Courts to Regulate the Contract At Bar.

Our opening brief discusses at length the legislative history of § 14(b), showing that Congress's main purpose was to authorize the States to regulate the closed shop and the union shop, *i.e.*, agreements "requiring membership in a labor organization as a condition of employment." (Petitioners' Br., pp. 40-46.) We show there that the language of § 14(b) is not an inadvertent, inexact way of granting the States *carte blanche* power to outlaw *all* kinds of compulsory agreements. It is an unambiguous and precise statement of Congress's intention.

Respondents' brief ignores all the legislative history cited in our brief, and instead it refers solely to selected parts of the legislative history of § 14(b).

Respondents' brief quotes a statement of Senator Taft that some States had enacted laws to make "all forms of compulsory unionism" illegal (Respondents' Br., p. 12); from the report of the House managers to the effect that § 13 of the original House Bill was intended to assure that "nothing in the Act was to be construed as authorizing any closed shop, union shop, maintenance of membership, or

other form of compulsory unionism agreement in any state where the execution of such agreement would be contrary to state law" (Respondents' Br., p. 13); from the House Conference Report to the effect that § 14(b) was intended to assure that "nothing in the Act was to be construed as authorising any closed shop, maintenance of membership, or other form of compulsory unionism agreement in any state where the execution of such agreements would be contrary to state law" (Respondents' Br., p. 14).

These isolated quotations constitute all of the legislative history on which respondents rely to show that Congress's use of the words "membership in a labor organization" was inadvertent, accidental and unintended.

The portions of the legislative history quoted above are far from dispositive, for each of them appears in the context of a discussion of "membership" requirements, merely stated in other terms.[8] While some committee reports and individual legislators casually expressed the belief that § 14(b) was intended to permit the States to prohibit "compulsory unionism" or "all forms of compulsory unionism," these words were not the words chosen by Congress when it translated its intention into law. They are, at best, inexact and nebulous phrases, and it is a matter of speculation what they meant in 1947 or what they mean today.

Surely Congress did not intend to permit the States under § 14(b) to prohibit all agreements requiring "compulsory unionism" in the sense of any compulsory relationship with

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[8] Respondents not only ignore all the contrary legislative history cited in our opening brief, including several explicit statements by Senator Taft, but also they ignore such contemporaneous cases as *A.F. of L.* v. *Watson* 327 U.S. 582(1946), to which Congress itself referred. (See Petitioners' Br., pp. 45-46.)

a union, for such an interpretation would virtually nullify those substantive provisions of the Act which authorize unions to serve as exclusive bargaining agents. See, *e.g.*, §§ 8(a)(5), 8(d)and 9(a). A union's power and responsibility as exclusive bargaining agent to negotiate wages, hours, seniority rights, working places and other conditions of employment in a collective bargaining agreements are enormous. The compulsion which arises from such an exercise of statutory power and responsibility is far more important than the power to require by contract that non-member employees pay a share of the union's actual collective bargaining costs. While such an interpretation of § 14(b) to authorize the States to prohibit such "compulsory unionism" seems ludicrous, the Supreme Court of Louisiana has recently so held. A union may not be an exclusive bargaining agent in that state, *Piegts* v. *Meat Cutters*, 228 La. 131, 81 So. 2d 835 (1955). The Florida courts below cited this case with approval in support of their view of § 14(b) (R. 29-30). (See Petitioners' Br., 21-23.)

In recent weeks the Wyoming legislature has enacted a statute which expressly provides that "no person is required to have any connection with . . . any labor organization." Wyoming Statutes, Ch. 39, L. 1963, Sec. 5. (B.N.A. State Labor Laws 61:261.) Literally interpreted, this Wyoming statute would proscribe all exclusive bargaining rights, exclusive hiring arrangements and other substantive features of the federal Labor Act, presumably on the theory that § 14(b) authorizes such an exercise of state power.

Even more important, respondents do not cite a single reference in the entire legislative history of § 14(b) to any statement by any Committee or legislator that § 14(b) was intended to permit the States to proscribe and regulate con-

tractual arrangements requiring employees to pay a ratable share of an exclusive bargaining agent's actual costs of collective bargaining.

Because they are aware of this weakness in their case, respondents argue that the agency shop (or the service fee arrangement herein) is "of recent origin, having come into use only within the past ten years. At the time the Taft-Hartley Act was enacted in 1947, the term was unknown, *and for this reason*, there is no reference to it anywhere in the reports and debates leading to passage of the Act." (Respondents' Br., p. 11.) (Emphasis added.) This assertion is simply untrue.

Contrary to respondents' assertion, the agency shop and similar arrangements were well-known in 1947. As pointed out both in our petition for *certiorari* and in our opening brief, the service fee has been common in American industry at least since 1942. Millis and Montgomery, Organized Labor 484 (1945). In 1943, the War Labor Board ordered parties to include service fee provisions in their contracts. See, *e.g.*, *Alexander Primas, Co.*, 21 War Labor Bd. Reps. 219, 221 (1943). Moreover, the "agency shop," sometimes known as the Rand Formula, was popularized by a well-known arbitration decision rendered by Canadian Chief Justice I. C. Rand in January of 1946. *Ford Motor Co. of Canada*, 1 Lab. Arb. Reps. 439 (1946).

That Congress was aware of the agency shop and similar arrangements is made clear by the fact that Senator Taft himself spoke of the Rand Formula on the floor of the Senate. 93 Cong. Rec. 4887, 2 Leg. Hist. of LMRA 1422. The *Ford Motor* decision was also referred to in testimony before the Senate Labor Committee by Secretary of Labor

Schwellenbach. (Hearings before the Committee on Labor and Public Welfare, 80th Cong., 1st Sess. on S. 55 and S.J. Res. 22, pp. 64-67.) (See also Br. of Labor Board in *N.L.R.B.* v. *General Motors*, No. 404, at pp. 26-27.)

Respondents, along with *amici curiae*, also argue that the meaning of § 14(b) is made clear by the existence in 1947 of several "right-to-work" statutes which expressly prohibit compulsory fee payments of any kind to a labor organization as a condition of employment. The statutes of Virginia, North Carolina, Georgia, Tennessee, Iowa, and Arkansas are expressly relied on by respondents. (Respondents' Br., pp. 11-12, ft.n. 4.)

This argument proves too much. Assuming that Congress was aware that some state statutes in 1947 expressly prohibited agreements requiring membership in a labor organization and the other statutes also prohibited any kind of compulsory fee payments to a union, then the inescapable conclusion must be that Congress chose to validate only those which prohibited compulsory membership. With an awareness of both kinds of state laws, Congress's words in § 14(b) take on special meaning. For the issue of fee payments unrelated to union membership had already been dealt with by some of the States in 1947 when Congress was legislating on this very subject in relationship to these state laws. See, *Meade Electric Co.* v. *Hagberg*, 159 N.E. 2d 408 (Ind. App.' Ct. 1959), where the Indiana court so reasoned in interpreting the enactement of the Indiana legislature.

Like the Chamber of Commerce,[4] respondents also argue that the post legislative history of the Taft-Hartley Act

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[4] C. of C. *Amicus* Br., pp. 16-17.

shows that Congress intended to permit the States to prohibit agency shop agreements and, presumably, the service fee contract at bar. In particular, respondents rely upon a 1959 statement of Senator Goldwater of Arizona who opposed an amendment to § 302 of the Taft-Hartley Act which would have permitted employers to deduct voluntary "periodic payments" other than membership dues from the wages of employees. (Respondents' Br., pp. 14-17.)

Congress in 1959 did not in any respect deal with § 14(b), with compulsory union membership, or with the question before the Court. The issue considered by Congress in 1959 was simply whether sums of money, other than union membership dues, might be deducted, or "checked-off" by an employer from an employee's wages, with the employee's consent. This issue obviously does not relate to the legality of a service fee or agency shop contract, for the check-off provisions of § 302 are completely independent of compulsory union membership. Under § 302, an employer may honor an employee's request that his membership dues be deducted whether or not the employer even has a labor agreement. Section 302 is an "anti-kick back" law.

At the very most, therefore, Senator Goldwater's statement in 1959 is an isolated observation by a single Congressman on an entirely different issue. As this Court recently said in *United States* v. *Price*, 361 U.S. 304, 313 (1960); "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one. See, *United States* v. *United Mine Workers*, 330 U.S. 258." The view of Senator Goldwater, twelve years after the fact, who spoke to an entirely different issue, is *a fortiori* irrelevant to the Congressional intent in 1947.

III. Respondents' Insistence That This Be Called An "Agency Shop" Case is A Frivolous Effort To Evade the Principal Issue.

Much of respondents' brief is devoted to the contention that this case involves an "agency shop," not a "service fee," contract. (Respondents' Br., pp. 5, 8, 10, 31-36.) It is not clear why respondents pursue this terminological distinction, for the issues before this Court obviously cannot be changed by a descriptive label which parties themselves place on a contract clause.

It was the validity of a specific clause, Article 19, Section 2, of the contract at bar which the Florida Supreme Court held to be invalid under Florida's right-to-work law (R. 20, 25), and it is the question of Florida's power to regulate and prohibit this specific clause which was raised in the petition for *certiorari*.

Respondents' insistence that the clause at bar be called an "agency shop" clause, rather than a "service fee" clause is an effort to minimize the important differences between the clause in *General Motors Corp. v. N.L.R.B.*, No. 404, and the contract clause at bar. Both of these clauses have been referred to loosely as "agency shop" clauses, but their terms and consequences are quite different. As our opening brief explains at length, Article 19, Section 2, of the instant contract differs profoundly from the usual "agency shop" clause, such as the clause in *General Motors*. (Petitioners' Br., pp. 28-33, 57-58).

In his brief to the Court in *General Motors* on behalf of the Labor Board, the Solicitor General carefully distinguishes between the amount, use and purpose of agency

shop payments there and the service fee payments in the instant case (N.L.R.B. Br., pp. 37-38):

> "... [under the proposed clause in *General Motors*] the non-member pays the full amount of initiation fee and periodic dues. His payments go to defray not only expenses of collective bargaining, for which he receives a *quid pro quo*—such as the cost of negotiating contracts, handling grievances and taking cases to arbitration—but also to finance welfare benefits and promote organization, lobbying and political activities. Thus, while an agency shop agreement [like that in *General Motors*] may leave a non-member free of what he deems a distasteful personal association, he is nevertheless required to finance the promotion of the Union's objectives—objectives that do not benefit him directly and that he may regard as obnoxious, if not an infringement of his personal political liberty. Cf. *International Association of Machinists* v. *Street*, 367 U.S. 740.
>
> "Many practical consequences, and therefore perhaps the legal effect, of a [*Schermerhorn*-type] contract requiring non-members to pay a fee proportionate to the cost of services given and received are altogether different from the incidents of the agency shop [as proposed in *General Motors*.]"

While the Solicitor General and the Board recognize the important differences between the *General Motors* clause and the *Schermerhorn* clause, respondents simply ignore these differences. Instead, respondents insist that the fact that the *Schermerhorn* contract has sometimes been called an "agency shop" contract fixes the issues before the Court and that the actual differences between this contract and the *General Motors* clause constitute "a false and fictitious issue." (Respondents' Br., p. 10.)

This Court has observed that there is "much dispute as

to the exact meaning" of terms such as open shop, closed shop, and union shop. Surely there is as much dispute as to what constitutes an agency shop. "There is such an important difference in emphasis between these different labels that we think it better to avoid use of any of them . . ." *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525, 528 n. 2 (1949).[5]

The notion of a service fee, based on a union's actual collective bargaining costs, is an innovation in labor relations in America. As pointed out in our opening brief, it is a forward-looking method of financing collective bargaining functions which serves the national policy of promoting responsible collective bargaining while simultaneously guaranteeing workers maximum personal liberty in choosing whether to embrace the institutional commitments of labor union membership.

A recent article in a Department of Labor publication discusses the service fee concept as "a middleway approach, under which non-members pay a share of the costs of collective bargaining." Dudra, Approaches to Union Security in Switzerland, Canada, and Colombia, 86 Monthly Lab. Rev. 136 (1963). Professor Dudra suggests that requiring non-members to pay a ratable share of the actual costs of collective bargaining services is an attractive alternative to compulsory union membership. He distinguishes a true service fee arrangement from the traditional agency shop on these grounds, *id.* 138:

> "The agency shop can be criticized on the grounds that it typically provides for the payment of full union

[5] Even respondents observe that at least eleven different names have been variously used to describe kinds of service fee arrangements. (Respondents' Br., p. 36, n. 10.)

dues by non-members. To some extent, non-members are overcharged for the services they receive and a part of their money supports union purposes and activities of which they might not approve. . . .

"The Swiss and the Colombian type of the agency shop is more equitable in this respect since non-members are taxed only in proportion to the benefits received. In addition, in Switzerland the amounts paid by non-members are earmarked for the purposes directly connected with the execution and application of collective agreements or for purposes benefiting everybody in the bargaining unit or in the trade as a whole."

Respondents simply refuse to recognize the substantive differences between the instant service fee arrangements and the *General Motors*-type clause.

IV. The Issue Litigated and Decided Below Was Whether Florida Has Power Under § 14(b) to Proscribe ANY Service Fee For Collective Bargaining Services. The Amount of the Fee Has Never Been Challenged.

Respondents' brief attempts to draw the Court's attention away from the contract clause itself and to focus on a notice posted after the contract's execution. (Respondents' Br., pp. 4-5, 33-34.) Their purpose is unclear, for this notice simply states that the amount of the service fee to be charged non-member employees will be equal to the union's dues and fees. This notice does not vary the contract; it merely explains that non-member employees are required to pay "service fees to the Local Union in order to aid the Union in meeting its authorized expenses as the exclusive bargaining agent" (R. 8).

Respondents' effort to make a serious point of the amount

of service fees cannot be the basis for changing the issues, for respondents themselves shaped the issue by attacking the validity of Article 19, Section 2, in their complaint (R. 3-4). The Florida Supreme Court squarely passed on the validity of the contract itself. The amount or reasonableness service fees has never been in issue; the sole issue has been whether *any* service fees might be charged.

The complaint specifically alleges that plaintiffs "do not want to participate in *any* Agency Shop relationship and they do not want to pay the defendant Union *any* dues or service fees or initiation fees" (R. 5). (Emphasis added.) Moreover, the specific relief sought by the complaint was that the union be restrained from receiving "any" service fees whatsoever (R. 7), regardless of amount.

The Florida Supreme Court unmistakably held that the instant contract was invalid to the extent that it required the payment of any fees of any kind, for it ruled that Florida law gives workers the right to decide whether they will "derive any benefit from association with a labor union. The choice is his to make" (R. 23). There is no hint in this decision that the *amount* of the service fees was in any way relevant to its disposition of the merits. On the contrary, the whole purport of the state court decision is that not one penny may be required of unwilling employees in Florida (R. 24), regardless of use or purpose.

Before this Court, therefore, the issue is simply whether Florida has power under § 14(b) to prohibit the required payment of *any* service fees "for the purpose of aiding the union in defraying costs in connection with its legal obligations and responsibilities as the exclusive bargaining agent of the employees in the appropriate bargaining unit" (R.

9). This was the only issue raised, litigated and decided below.

V. Although Respondents Challenge Applicability of the Preemption Doctrine, Their Arguments Concede That This Action Is Within the Exclusive Jurisdiction of the Labor Board.

In our opening brief we demonstrated that the Labor Board must decide in the first instance whether the instant contract is protected, proscribed or entirely unregulated by the Taft-Hartley Act, for Congress's comprehensive regulation of labor relations requires the States to defer to the Board's primary jurisdiction where challenged conduct is "arguably" within the regulatory ambit of the Labor Act. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959). (See extended discussion in Petitioners Br., pp. 16-24.)

Since we filed our brief, the Solicitor General and the Labor Board have filed their brief in the *General Motors* case in which they suggest agreement with this preemption argument (Labor Board Br., *N.L.R.B.* v. *General Motors*, No. 404, p. 42):

> "The National Labor Relations Board has had no occasion to rule upon whether a contract requiring payment of a true service fee as a condition of employment is outside the scope of Section 14(b) and otherwise consistent with the policies of the Act."

Respondents' main answer to our argument that the States have no jurisdiction to regulate this contract in the first instance is that the facts of this case are distinguishable from the facts of *Garmon*, a tort case which arose out of peaceful picketing. (Respondents' Br. 23-25.) This

answer is totally unresponsive, for *Garmon* was not based simply on the fact that California there sought to regulate picketing: it was based on the conflict between the Labor Board's power to regulate activities under § 8 of the Act which California sought to regulate under its law of torts. Whether the danger of conflicting regulation between federal and state agencies involves picketing, discharges, threats of discharge or other kinds of conduct is immaterial to the doctrine of federal preemption expressed in *Garmon*.

Although many of this Court's preemption cases have involved state court regulation of strikes and picketing, this Court has also struck down state regulation of a collective bargaining agreement where there was neither a strike nor picketing. *Local 24, Teamsters* v. *Oliver*, 358 U.S. 283 (1959). It has also struck down state regulation of an alleged, discriminatory discharge. *Plankington Packing Co.* v. *Wisconsin Employment Relations Board*, 338 U.S. 953 (1950) (Memorandum). The *Oliver* case, like the instant case, was an action by an employee to enjoin the operation of a labor agreement, yet the Court unhesitatingly held that the Ohio courts had no power to regulate "an agreement which was the fruit of the exercise of collective bargaining rights" under the federal Labor Act. 358 U.S. at 286.

Respondents also argue that there can be no federal preemption here for the reason that this case involves "no union picketing or strike, or any other course of action that could independently be said to be an unfair labor practice under § 8. (Respondents' Br., p. 29.) This argument is also made by the State of Florida. (Florida *Amicus* Br., p. 18.)

While the distinction between strikes and picketing on the one hand and other activities in interstate commerce on

the other hand is patently specious, *Oliver* and *Plankington Packing Co., supra,* it is not necessary for the Court to decide here whether the doctrine of federal preemption turns on such a fine distinction, for this case does involve *independent conduct* beyond the mere execution of a contract. Respondente' complaint alleges unfair labor practice *conduct* by the union and the employer herein pursuant to the terms of the contract (R.5):

> "That the Agency Shop clause is being enforced by the defendant Union, the defendant President of the Union, and the Union's representatives and agents. *The plaintiffs have been orally advised within the past two (2) weeks that if the plaintiffs do not join the Union or pay the initial service fees and monthly service fees, that they will be discharged by the defendant Employer.*" (Emphasis added.)

Thus, the complaint flatly alleges that respondents have been *threatened with discharge* unless they comply with Article 19, Section 2, of the contract by paying the requisite service fees. Moreover, respondents' complaint seeks to restrain these alleged threats of discharge, specifically asking for this injunctive relief against petitioners and the employer (R. 6):

> "(b) From inducing, encouraging, aiding, ordering, or causing employees of the defendant Employer *to discharge the employee plaintiffs as a means of forcing the defendant Employer to enforce any such agreement or provision.*" (Emphasis added.)

There can be not the slightest doubt that threatening employees with discharge for failure to pay money to a labor organization is arguably a violation of §§ 8(a)(1) and (3) and §§ 8(b)(1)(a) and (2) of the Labor Act, as an invasion of § 7 rights, except where such threats are made

pursuant to a lawful agreement. See, *e.g.*, *Radio Officers Union* v. *Labor Board*, 347 U.S. 17, 42-43 (1954); *Labor Board* v. *Pappas & Co.*, 203 F.2d 569 (9th Cir. 1953); *Labor Board* v. *United Hoisting Co.*, 198 F.2d 465 (3d Cir. 1952), Cert. denied 344 U.S. 914; *Puerto Rico S.S. Assn.* v. *Labor Board*, 281 F.2d 615 (D.C. Cir. 1960).

If the foregoing reasons were not sufficient to establish the applicability of the federal preemption doctrine in this case, several candid admissions in respondents' brief abundantly show that the state court below has intruded on the primary jurisdiction of the Labor Board to administer the federal Labor Act. First, respondents assert (Respondents' Br., p. 37):

> ". . . Section 7 of the National Labor Relations Act guarantees the right of employees not only to join, form and *assist* labor organizations, but also to refrain from joining, forming or *assisting* labor organizations. It must certainly be admitted that the discharge of an employee for failure to pay money for the purpose of *assisting* a labor union to defray its costs, whatever these costs might be, would deny him this fundamental right protected by section 7 to refrain from *assisting* a labor union." (Emphasis in original.)

Thus, respondents themselves say that "it must certainly be admitted" that enforcement of Article 19, Section 2 of this contract would be an unfair labor practice as an alleged interference with employees' § 7 rights under the federal Act. While we believe that this contract is arguably protected under the Act as a legitimate subject of bargaining, we agree with respondents' candid admission that this contract is at least arguably unlawful under the federal Act, which necessarily brings this contract well within the

Board's exclusive competence to adjudicate alleged unfair labor practices.

Lest there be any doubt that respondents have conceded N.L.R.B. jurisdiction over the subject matter of this action respondents make another argument, the substance of which is that this contract might be found by the Labor Board to impose unlawful discrimination against members of the bargaining unit who are not union members (Respondents' Br., pp. 41-42):

> "The Board has also held that a union which charges fees for services rendered non-members thereby prejudices its status as the bargaining agent. *Hughes Tool Co.*, 104 NLRB 318. In that case, the Board indicated it would revoke the certification of a union if it did not abandon its claimed right to charge a service fee of $15 for handling grievances of non-union members, and other service fees in varying amounts. Thus, petitioner herein, in asserting its claim to 'service fees' may not be aware of this threat to its right to continue as bargaining agent."

Again, from respondents' own brief comes a compelling reason for the applicability of the preemption doctrine to this case. While we do not agree with respondents' legal conclusions that the N.L.R.B. should or would find the instant contract to constitute an unfair labor practice, we do agree with respondents that the contract is well within the ambit of the Board's exclusive regulatory power. *Hughes Tool Co.*, 104 NLRB 318 (1953), relied on by respondents, involved a collective bargaining relationship in Texas, which has a right-to-work statute very much like the Florida law at bar. Tex. Rev. Cir. Stat. Art. 5154g (Supp. 1960). The union there imposed a fee system on non-member employees of $15 to process each grievance and

$400 to take a grievance to arbitration. According to the Board, 104 NLRB at 324:

> "The issue . . . is whether the imposition of these fees is in derogation of the duties of the bargaining representatives to provide an equal representation to all employees in the unit, or is only a justifiable measure to control and discourage 'free riders.'"

The Board observed that Texas's right-to-work statute, like Florida's, is written in the language of § 14(b) to prohibit "membership" in a labor organization as a condition of employment, and the Board held that, as a matter of federal law, the fees charged non-members were discriminatory and contrary to the union's duty as exclusive bargaining agent of all employees. 104 NLRB at 329. Although *Hughes Tool* is factually distinguishable from the case at bar,[8] both involve service fee charges to non-members in right-to-work states. It is perfectly clear, therefore, that such arrangements are subject to the Board's regulatory power.

VI. Respondents' Reliance On § 8(a)(3) Is Misplaced as A Basis For Explaining Congress's Plain Intention and Its Words in § 14(b).

Respondents' brief reflects a stark inability to reconcile the language of § 14(b) with the decision of the court below. Therefore, in an effort to show that Congress did not really mean what it said in § 14(b), respondents urge that it is § 8(a)(3)—not § 14(b)—which best explains what Congress

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[8] In *Hughes* the union refused to represent non-members unless they paid the fees in question. Here the union is willing to represent all employees. There the fees were imposed by the union unilaterally, whereas here the fees are required by a collective bargaining agreement.

intended to achieve by § 14(b). But even as to § 8(a)(3), respondents argue that Congress's words do not express Congress's real intention.

Respondents' argument is as follows: § 14(b) authorizes the States to proscribe agreements requiring "membership in a labor organization" as a condition of employment; § 8(a)(3) expressly authorizes parties to make agreements requiring "membership" as a condition of employment; however, a proviso to § 8(a)(3) provides that employees may not be discriminated against for non-membership, if "membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership." Therefore, respondents argue, § 8(a)(3) does not really authorize a "membership" requirement but only a dues and fees requirement, and § 14(b) by parity of reasoning thus authorizes the States to prohibit any agreement requiring that employees pay any sum of money to a labor organization. (Respondents' Br., pp. 18-22.) Based on this tortuous reasoning, respondents conclude that: "It follows that for section 14(b) to have any meaning it can only be construed as preserving to the states the authority to regulate the same forms of union security agreements as are authorized or permitted under section 8(a)(3)." (Respondents' Br., p. 22.) This argument is a series of misconceptions.

First, if Congress had intended to authorize the States to proscribe under § 14(b) "the same forms of union security as are authorized" under federal law, Congress would have done so. It did not do so because § 8(a)(3) and § 14(b) have different purposes. See Petitioners' Br., pp. 59-63. See also *Schwegemann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951).

Second, § 8(a)(3) expressly and unambiguously authorizes agreements requiring "membership"; it does not merely authorize agreements requiring employees to pay money to a union. Section 8(a)(3) provides:

> "... nothing in this Act ... shall preclude an employer from making an agreement with any labor organization ... to require as a condition of employment *membership* therein ..." (Emphasis added.)

Third, the second proviso to § 8(a)(3) does not erase the express permission to execute agreements requiring "membership." It merely provides that:

> "no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such *membership was not available* to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that *membership was denied or terminated* for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; ..." (Emphasis added.)

Fourth, the second proviso of § 8(a)(3) provides safeguards on the use of "membership" requirements over job rights. It reflects Congress's concern over past abuses of the closed shop. Since § 14(b) authorizes the States to prohibit "membership" requirements altogether, the second proviso to § 8(a)(3) obviously is not relevant to § 14(b), and there is no parity between these two sections.

Fifth, as our opening brief explains fully, the Congress, the N.L.R.B., the federal courts and others have said that § 8(a)(3) does authorize more than just money payments to a union. It authorizes parties to write contracts requiring

"membership," which includes a willingness to join. (Petitioners' Br., 45-46.) To be sure, the second proviso to § 8(a)(3) provides that an employer may not "justify any discrimination against an employee for non-membership," if "membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership." But surely this does not mean, as respondents assert, that the federal Act does not authorize the execution of agreements requiring "membership" in a labor union as a condition of employment. The power to write a contract which states a membership requirement is itself vitally important, for most employees voluntarily abide by the contract's terms.

For these reasons, § 8(a)(3) offers little comfort to respondents' view that the words of § 14(b) are not indicative of Congress's intention. The contrary is the case, for "membership" is the key concept in both sections. Respondents ignore the "membership" concept altogether.

The cases which respondents cite in support of the proposition that § 8(a)(3) does not authorize the execution of agreements requiring "membership" in a labor organization are patently inapposite. Our opening brief discusses in great detail the decision of the Seventh Circuit in *Union Starch & Refining Co.* v. *Labor Board*, 186 F.2d 1008 (7th Cir. 1951), cert. denied 342 U.S. 815. This case, contrary to respondents' assertion, holds that an employee must be willing to become a union member under § 8(a)(3). (Petitioners' Br., pp. 50-52.) In its petition for *certiorari* to this Court, the N.L.R.B. in that case said that its interpretation of proviso (B) of § 8(a)(3) "rests on the premise that the employees . . . manifested a desire to become union mem-

bers." (N.L.R.B. Brief in Opposition to Pet. for Cert., at p. 16, Oct. Term, 1951, No. 64.)

N.L.R.B. v. *Philadelphia Iron Works*, 211 F.2d 937 (3d Cir. 1953), is similarly inapposite. This case involved discrimination by a union against a union member under an exclusive referral system and a union shop. There was no question in this case about the right to require membership under § 8(a)(3) because the employee in question had been a member of the union "in good standing" for many years. The only issue was whether the union could discriminate between its members in making job referrals.

Respondents' reliance on *N.L.R.B.* v. *Pape Broadcasting Co.*, 217 F.2d 197 (5th Cir. 1954), is similarly misplaced. The employee in the *Pape* case was perfectly willing and, indeed, anxious to become a member of the union, but he was denied membership. The court's decision quotes the employees' testimony that he "had made application for membership in the union." (217 F.2d at 202). Notwithstanding this employee's willingness to join the union he was *denied* membership and was therefore unlawfully discharged. This is a case under § 8(a)(3) where a union simply refused to admit an employee into membership, yet the union sought to affect the employee's job rights because of his non-membership.

Finally, respondents' reliance on *N.L.R.B.* v. *Local 504, Machinists*, 203 F.2d 173 (9th Cir. 1953), is quite wrong. In this case an employee was discharged at the union's request after the union itself had suspended him from membership for dual-unionism and had fined him $500. This case involved no more than the union's refusal to readmit this employee into membership unless he paid the $500 fine. The employee was plainly willing and eager to join

the union, but, as the Ninth Circuit's decision recites, he was "denied membership in the Union, that denial was because of his failure to pay a fine." 203 F.2d at 176.

For these reasons, respondents' argument, that § 8(a)(3) does not permit a "membership" requirement, and that therefore § 14(b) must authorize the states to prohibit something other than "membership," does bear close analysis. Section 8(a)(3) and § 14(b) are not parallel, because they have different purposes, as is made quite clear by the brief of the Solicitor General on behalf of the N.L.R.B. in the *General Motors* case. (N.L.R.B. Br., *N.L.R.B.* v. *General Motors Corp.*, pp. 40-41.)

It is clear that § 8(a)(3) permits agreements requiring membership; § 14(b) authorizes the states to prohibit agreement requiring membership, nothing more. Membership is the essential concept of both sections.

Conclusion

For the reasons set forth above, the judgment of the Supreme Court of Florida should be reversed and vacated.

Respectfully submitted,

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